Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MARGARET M. KEANE,
Petitioner,

v.

IBM PENSION PLAN,
Respondent,

On Petition For Writ of Certiorari
To The Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

MARGARET M. KEANE
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99 pp

QUESTIONS PRESENTED FOR REVIEW

I.

SHOULD THIS COURT GRANT CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS:

A) BLATANTLY REFUSED TO ENFORCE FEDERAL STATUTES IN CALCULATING MS. KEANE'S FIFTY PERCENT SHARE OF THE ACCRUED BENEFIT?

B) GRANTED SUMMARY DISMISSAL WHEN THE PLAN, DEFENDANT, MOVANT DID NOT PROVE THE ABSENCE OF ANY GENUINE ISSUES OF MATERIAL FACT, WHEN THERE IS NOTHING IN THE RECORD TO SUPPORT SUCH A CLAIM AND PETITIONER HAS SUPPORT FOR HER CLAIM?

II.

DID THE MICHIGAN COURT OF APPEALS VIOLATE MS. KEANE'S CONSTITUTIONAL RIGHTS UNDER THE SUPREMACY CLAUSE OF ARTICLE VI OF THE U.S. CONSTITUTION WHEN:

A) IT AFFIRMED THE TRIAL COURT'S STATE-LAW-BASED SUMMARY DISMISSAL PRIOR TO THE PLAN'S COMPLIANCE WITH ERISA § 503 OR COMPLETION OF DISCOVERY?

B) IT DID NOT INTERPRET THE SECOND CLAUSE OF THE FIRST SENTENCE OF THE QDRO IN A MANNER TO ENFORCE THE INTENT OF EITHER THE PARTIES OR ERISA USING ERISA DEFINITIONS, WITHOUT RENDERING THE FIRST CLAUSE MEANINGLESS?

III.

DID THE COURT OF APPEALS VIOLATE MS. KEANE'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION WHEN IT ADJUDICATED THIS CASE WITHOUT MAKING THE FOLLOWING FINDINGS OF FACT WHICH ARE ABSOLUTELY ESSENTIAL TO DETERMINE THE BENEFITS SHE WAS ENTITLED TO RECEIVE AND WHETHER SHE RECEIVED THEM?

ARGUMENT: FINDINGS OF FACT

A) WHAT IS MS. KEANE'S "ASSIGNED BENEFIT" UNDER THE QDRO?

B) WHAT ARE THE DIFFERENCES, IF ANY, BETWEEN THE "ASSIGNED BENEFIT" AND THE BENEFIT THE PLAN IS REQUIRED TO PAY HER?

C) WHAT AND HOW MANY ARE THE CORRECT ACTUARIAL EQUIVALENT FACTORS THAT NEED TO BE APPLIED TO THE "ASSIGNED BENEFIT" TO CONVERT IT TO A BENEFIT OF EQUAL ACTUARIAL VALUE TO THE FORM OF THE BENEFIT THE PLAN IS REQUIRED TO PAY MS. KEANE?

D) WERE EACH OF THE CORRECT FACTORS APPLIED TO THE "ASSIGNED BENEFIT" TO DETERMINE THE BENEFIT PAYMENTS FOR MS. KEANE?

E) WHICH OF THE BENEFITS PROVIDED UNDER THE PLAN IS THE PLAN PAYING MS. KEANE?

IV.

IS THE QDRO AMBIGUOUS GIVEN THAT:

A) THE MICHIGAN TRIAL COURT INTERPRETED MS. KEANE'S BENEFIT AS A "FROZEN BENEFIT";

B) THE MICHIGAN COURT OF APPEALS INTERPRETED IT AS FIFTY PERCENT OF A DEFERRED VESTED ACCRUED BENEFIT, EXCLUDING THE EARLY RETIREMENT SUPPLEMENTAL BENEFIT;

C) THE PLAN CALCULATES IT TO BE A BENEFIT ACTUARIALLY EQUIVALENT TO MR. KEANE'S NOVEMBER 18, 1985 EARLY RETIREMENT BENEFIT WITH AN OPTION FOR DEFERRED INCOME DEFERRING CALCULATION AND COMMENCEMENT OF BENEFIT TO AUGUST 1, 1992; AND

D) THE PLAINTIFF PETITIONER INTERPRETS IT AS FIFTY PERCENT OF THE ACTUARIAL EQUIVALENT OF THE NOVEMBER 18, 1985 RESERVES REQUIRED TO PROVIDE THE ACCRUED BENEFIT.

E) THE PLAN'S COMPUTATION OF BENEFITS IS IN CONFLICT WITH MR. BORGESON'S LETTER OF JULY 9, 1991, INTERPRETING THE QDRO.

V.

DOES THE QDRO TRANSFER THE SAME CONTRACTUAL RIGHT TO BENEFITS TO MS. KEANE THAT ERISA PROVIDES TO MR. KEANE?

VI.

IS THE PLAINTIFF ENTITLED TO COSTS, PRE-JUDGMENT INTEREST, AND LEGAL FEES AS WELL AS COMPENSATORY DAMAGES FOR LOSSES INCURRED FROM THE WITHHOLDING OF HER UNCONTESTED BENEFIT PAYMENTS, AND TO PUNITIVE DAMAGES FROM THE PLAN THAT PROMISED HER 50% OF MR. KEANE'S RETIREMENT ELIGIBLE NOVEMBER 11, 1985 ACCRUED BENEFIT WHEN IT QUALIFIED THE QDRO AND GAVE HER A DEFERRED EARLY RETIREMENT BENEFIT WHICH REDUCES HER AWARD BY ABOUT 50% AND ENRICHES THE PLAN?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were *Margaret M. Keane* and the *IBM Pension Plan*

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The Order of the Supreme Court of Michigan denying review appears in the Appendix at 1a. The decision of the Michigan Court of Appeals denying reconsideration appears in the Appendix at 2a. The Order of the Michigan Court of Appeals Majority Affirming the Trial Court appears in the Appendix at 3a. The Dissenting Opinion of the Michigan Court of Appeals' Justice Helene N. White appears in the Appendix at 9a. The Opinion and Order of the Kalamazoo Circuit Court denying reconsideration appears in the Index at 14a. The Kalamazoo Circuit Court Order requiring Defendant (the Plan) to respond to Motion for Reconsideration appears in the Appendix at 20a. The Kalamazoo Circuit Court Order of Dismissal with Prejudice appears in the Appendix at 22a. The Kalamazoo Circuit Court Pretrial Summary and Scheduling Order appears in the Appendix at 24a. The DRO entered in the Kalamazoo Circuit Court on 5-28-91 which was Qualified by the IBM Plan on 4-21-92 appears in the Index at 26a. None of the above opinions have been published.

JURISDICTION

The Michigan Court of Appeal's decision in this case is in conflict with the decision of this Court interpreting the primary intent of ERISA and with the Federal Courts' decisions interpreting the ERISA and REA statutes. Therefore, the Michigan Court of Appeals is in conflict with this Court's decisions concerning the rights of citizens to enforcement of Federal law which is protected under the Supremacy clause of Article VI of the U. S. Constitution. The adjudication of this case by the Michigan Court of Appeals prior to findings of fact absolutely essential to an equitable decision by the court

violates Ms. Keane's right to due process protected under the Fourteenth Amendment.

Additionally, the affirmation of a Michigan State-based Summary Dismissal prior to the Plan's compliance with ERISA Sec. 503 abrogates Ms. Keane's rights under Federal Law and denotes a conflict between a Michigan Court Rule and a Federal Statute. The order of the Supreme Court of Michigan denying review in this case was entered on December 21, 1999. Pursuant to 28 USC 1257, this Court has jurisdiction to review the decision of the Michigan Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1) United States Constitution Article VI:

This Constitution, and the Laws of the United States...which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby....

2) United States Constitution Amendment Article XIV:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

3) ERISA Statutes

Sec 204(g)(1)

The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan,...

Sec. 503

In accordance with regulations of the Secretary, every employee benefit plan shall–

> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 USC § 1002(22)

The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age.

29 USC § 1056 (d)(1)

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 USC § 1056 (d)(3)(A)

Paragraph (1) ...shall not apply if the order is determined to be a qualified domestic relations order.

29 USC § 1056 (d)(3)(B)(i)

The term "qualified domestic relations order" means a domestic relations order--(I) which...assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and (II) with respect to which the requirements of subparagraphs (C) and (D) are met,

29 USC § 1056(d)(3)(D)

A domestic relations order meets the requirements of this subparagraph only if such order (i) does not require a plan to provide any type or form of benefit, or any option not otherwise provided under the plan, and (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value).

29 USC § 1132 (a)(1)(B)

A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to further benefits under the terms of the plan;

29 USC § 1132 (e)(1)

Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title.... State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 USCS § 1140

It shall be unlawful for any person to discharge, fine...or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan....

29 USC § 1144(a)Supersedure

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee

benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

4) Michigan Court Rules

MCR 2.116 - Summary Disposition

A motion under this rule may be filed at any time consistent with subrule (D)...

(C) Grounds. The motion may be based on one or more of the following grounds:

(8) The opposing party has failed to state a claim on which relief can be granted.

(10) Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

(D) Time To Raise Defenses and Objections. (3) The grounds listed in subrule (C)(4), (8), (9), and (10) may be raised at any time.

STATEMENT OF THE CASE

Ms. Keane discovered that Mr. Keane had violated the stipulated Judgement of Divorce's provision to select her as beneficiary of the 50% Joint and Survivor Annuity Option under his IBM Pension Plan. On December 6, 1990, she petitioned for entry of a QDRO to correct his violation. On March 15, 1991 a stipulated agreement was entered in the record of case number 80-100823-DO which provided Ms. Keane in her own name 50% of Joseph Keane's November 18, 1985 vested and accrued benefits as a substitute for the Judgment's provisions in

reference to the pension. On November 18, 1985, Mr. Keane was retirement eligible with an entitlement to an early retirement benefit commencing upon termination from the Plan. App. 54a.

Mr. Keane prepared a DRO ordering the Plan to pay Ms. Keane a benefit actuarially equivalent to the "assigned benefit", which is defined as 50% of Mr. Keane's November 1, 1985 accrued benefit under the Plan. He also prepared an amendment to the Judgment which was not acceptable because it would have vacated the award to Ms. Keane of 50% of the two retirement benefits additional to the pension (the 401K and the retirement enhancement program). The DRO was submitted to the court on May 28, 1991 but the amendment was not, leaving the 401K and the ITO II (retirement enhancement) benefits to be divided at Mr. Keane's retirement. After the parties stipulated to the fact that the words of the DRO complied with their March 15, 1991, stipulated agreement, the DRO was entered in the file. On April 21, 1992, it was qualified (App. 26a) by Mr. Borgeson, IBM's corporate counsel, the Retirement Plan actuary's counsel and the Retirement Plan spokesperson. It basically enforces the stipulated judgment.

Mr. Keane petitioned for retirement and on July 9, 1992, Mr. Borgeson sent a very misleading letter (App. 34a) to Mr. Keane's attorney interpreting the language in the order where he admits "he was somewhat confused by the wording of the QDRO". See Appendix 35a for commentary on this letter excerpted from the petitioner's application to the Michigan Supreme Court. The Plan's actual computation is not what one would expect from this letter.

The Plan's determination of benefits for commencement on July 31, 1992 (App. 33a) provides Ms. Keane with the November 18, 1985 payable-at-normal-retirement-age-payment calculated as an early retirement benefit under the Plan's schedule for early retirement reductions at age 62, (Mr. Keane's age on August 1, 1992), which is no reduction (App. 31a). This benefit is not 50% of Mr. Keane's November 18, 1985 normal retirement benefit including or excluding the early retirement supplemental benefit. It is 50% of Mr. Keane's early retirement benefit calculated as if he retired on November 18, 1985 and elected to defer calculation and commencement of his early retirement benefit to August 1, 1992 at his age of 62. App. 32a.

The Plan performed an actuarial equivalent conversion of the benefit payments from Mr. Keane's life span to Ms. Keane's life span (L, E, 1-6 in alternate payee col). App. 33-34a. Table 2 shows where the Plan reduced Mr. and Ms. Keane's benefit by a 50% joint and survivor factor since they are each the beneficiary of 50% of the other's payment if they are the survivor. App. 33a. Originally the plan had erroneously applied the greater reduction to Ms. Keane's benefit and was recalcitrant but eventually did correct its mistake after legal expenses were incurred by Ms. Keane.

This calculation provides Ms. Keane with a benefit actuarial equivalent to 50% of Mr. Keane's accrued November 18, 1985 benefit calculated as if he terminated, took early retirement and elected an early retirement deferred to age 62 retirement income option. The Plan has never pointed out what words in the QDRO this interpretation is based on.

Mr. Keane retired on August 1, 1992 and the Plan commenced benefits to him but withheld all payments to Ms. Keane in violation of its fiduciary obligations to her under ERISA. This clearly was disparate treatment of an alternate payee beneficiary by the Plan, in violation of 29 USC § 1140. Ms. Keane's then lawyer spent the next 18 months petitioning the court for payment of her 50 percent of the $122,000 in the 401K account and the $100,000 ITO II early retirement enhancement program. Further, during that time, Ms. Keane's counsel corresponded with Mr. Borgeson of IBM for commencement of benefits (App. 39a and 46a for the first and last of those letters) as well as a reconsideration of the benefits determination. All requests were denied.

At a hearing on January 13, 1994, when the court's decision in case No. 80-100823DO on the petition for enforcement of the Judgment of Divorce re: division of the 401K and ITO II plus temporary alimony due to no income from the Plan was announced, the court's decision was that the QDRO substituted for all retirement benefits even though the judgment had not been amended. Ms. Keane was impoverished. The order was entered on March 26, 1994. As a direct result of the Plan's economic duress, withholding even the uncontested payments from Ms. Keane, she could not retain an attorney to appeal the decision which was in direct conflict with the May 28, 1991 decision of the parties to provide Ms. Keane with the full value of the Judgment's award and not amend the Judgment. Two expert witnesses had testified that each of the benefits were retirement benefits – the ITO II because that payment was triggered by Mr. Keane's retirement.

The foregoing occurred in case No. 80-100823 DO and is included to demonstrate the pervasiveness of the

pain, suffering and financial losses, resulting from the Plan's malicious assault on Ms. Keane's retirement assets. The financial losses could increase, depending on this court's decision in *Keane v Keane* Case 80-100823 DO.

Ms. Keane, reduced to subsisting on SSI payments and food stamps, proceeded in pro per in her quest for relief from the Plan's denial of benefits awarded to her under the QDRO. The first two suits she filed for enforcement of the QDRO were dismissed for procedural reasons and were uncontested. The second suit, *Margaret M. Keane v. IBM* Case D94-3467CZ, is included in this current case as complaint Exhibit D; the Plan's response is Exhibit E. It was in this case that Ms. Keane petitioned the court for commencement of the uncontested part of her benefit. The Plan had accumulated $30,000 of Ms. Keane's uncontested benefits, but she hadn't been able to retain an attorney to file an appeal of the March 26, 1994 Order of the trial court.

Immediately preceding the March 13, 1995 hearing for both dismissal of the case against the IBM Company (D94-3467CZ) and commencement of benefits, the Plan's lawyer stated that the Plan would commence such payments and pay a lump sum for the retroactive uncontested benefits—there was no need for a court order. The Plan did commence benefits and did send a check in the amount of $30,000 for back payments with interest, but continued its economic duress by making the check payable to Ms. Keane rather than her 401K account as petitioned. This occasioned legal fees and a year's delay in getting the check cashed, for which she is still owed interest.

This case, *Margaret M. Keane v. IBM Pension Plan*, was filed on July 25, 1995 and assigned a discovery cut-off

date of May 31, 1996. App. 24a. The Plan, even though it had not complied with ERISA Sec. 503 and had not responded to submitted admissions, requests for documents and interrogatories, filed a petition for summary disposition pursuant to MCR 2.116(C)(8) on March 21, 1996. This petition was based, according to its brief, on the Plan's interpretation of the QDRO, with a series of asterisks replacing the second paragraph of the QDRO. This does not satisfy either the Federal or Michigan State requirements for summary dismissal, particularly since the court in its decision treated the motion as though it was a combined (C)(8) and (C)(10) motion and that court hadn't found the facts absolutely necessary for calculation of Ms. Keane's benefit.

At the May 6, 1996 hearing on the summary dismissal petition, the Plan changed its rationale for dismissal to an interpretation of the second paragraph's actuarial equivalence order to mean only a reduction for conversion to a 50% joint and survivorship benefit. Note that the Plan in its determination of benefits performed two actuarial equivalent conversions: one for the conversion to a 50% joint and survivor benefit and one for a conversion from Mr. Keane's life span to Ms. Keane's life span. Did the meaning of actuarial equivalence change between July 1992 and May 6, 1996 or is the Plan making a bold misstatement of fact? The Plan also erroneously states that the Internal Revenue Service and ERISA prohibit the plan from providing increased benefits under a QDRO. What ERISA and IRC say is that the Plan should not qualify a QDRO if it requires the plan to provide to the alternate payee benefits greater than what the participant is entitled to receive. They do not allow the Plan to qualify a DRO and then amend it. See 29 USCS § 1056 (d).

In closing statements the trial court did not seem to understand that 50% of Mr. Keane's benefits accrued as of November 18, 1985, include 50% of each and every benefit Mr. Keane was entitled to receive if he terminated on November 18, 1985, and that includes the time and benefits between November 18, 1985 and August 1, 1992 which are part of Ms. Keane's November 18, 1985 accrued benefit. Those payments would have been included in the present value of Mr. Keane's benefits on November 18, 1985 if Ms. Keane had gotten a lump sum settlement and then earned interest on that money directly. The case was dismissed prematurely. The court allowed the IBM Plan to unilaterally get around the intent of the QDRO. Then, the court dismissed the Complaint under MCR 2.116(C)(10) or (8).

The Order of Dismissal was entered on May 21, 1996 with prejudice even though at the May 6, 1996 hearing the court did not indicate that the dismissal was with prejudice. App. 22a. On June 4, 1996, Attorney Kenneth Rathert filed a ten-page Motion for Reconsideration.

On June 5, 1996, the court found the complexity of these issues required a response from Defendant, and an order requiring Defendant to respond to Plaintiff's Motion was entered. App. 20a. A hearing on the Motion for Reconsideration was held on October 7, 1996. It was denied and the order was entered on February 25, 1997. App. 14a.

An Appeal to the Michigan Court of Appeals was then filed on a timely basis. In a split decision from a panel of three, the majority opinion affirmed the trial court on December 29, 1998. App. 3a and 9a. A Motion for Re-Hearing was filed on a timely basis on January 19, 1999. The Plan responded to the plaintiff's Motion for Re-

Hearing on February 1, 1999 and the Plaintiff replied to that response on February 10, 1999. The Michigan Court of Appeals majority denied the Motion for Re-Hearing on March 16, 1999, even though Judge White would grant it. App. 2a.

The Court of Appeals decision interprets the second clause of the QDRO first sentence to amend the award of 50% of Mr. Keane's accrued benefit to an award of 50% of Mr. Keane's November 18, 1985 accrued benefit excluding the early retirement supplemental benefit since it does not apply the minimum 29 USCA § 1002(22) benefit calculation to the payable at normal retirement age benefit For argument's sake, if that opinion was correct, the "assigned benefit" at Ms. Keane's termination on November 18, 1985 would have been an actuarial reduced (about 50%) payable at normal retirement age benefit payment which then must be increased about 80% (App. 56a for factor of increase due to interest and survivorship) since commencement of benefits was deferred from 1985 to 1992 yielding about a 30% increase in the benefit payable at age 65 for commencement to Ms. Keane on August 1, 1992. The court clearly did not have the requisite skills to determine the benefit resulting from its incorrect interpretation of the QDRO. A Writ of Certiorari should be granted and this court should opportune itself to guide lower courts to avoid substituting its opinions and prejudices for necessary professional expert advice available with discovery.

An Application for Leave to Appeal was filed in the Michigan Supreme Court on April 6, 1999. In this Court, the Plan evidences its claim that Ms. Keane has not stated a claim on which relief can be granted with an outrageous interpretation of the QDRO. On Page 4 of its brief it states that the first paragraph of the QDRO which

describes the "assigned benefit" applies only if Mr. Keane was age 65 at retirement. The Plan goes on to describe Ms. Keane's benefit as "actuarially equivalent" to the assigned benefit which it had just said wasn't applicable because Mr. Keane was not age 65. The plaintiff petitioner responded to this brief on May 18, 1999, where page 8 specifically responds to page 4 of the Plan's brief. The application was denied on December 21, 1999. App. 1a. Two of the justices would have remanded to the trial court because the record is inadequate to support summary disposition. This case is here filed on a timely basis.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The United States Congress created national policy in 1974 when it passed ERISA into law and again in 1984 when the REA amendments were passed into law. Part of the function of this court is to ensure consistent and principled application of fiduciary's obligations under these statutes.

(*Morse v. Stanley* 732 F. 2d 1139(2d Cir. 1984))

I.

A. THIS COURT SHOULD GRANT CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS BLATANTLY REFUSED TO ENFORCE FEDERAL STATUTES AND CASE LAW IN CALCULATING MS. KEANE'S SHARE OF THE ACCRUED BENEFIT?

This court should grant certiorari to assure that the intent of congress in passing ERISA into law is enforced in the calculation of accrued benefits awarded in QDROs as well as those calculated for transfers to cash balance plans. The court in *Desmarais v. Joy Mfg. Co.*; 538 A.2d 1218, 1220 (N.H. 1988) said:

> Before considering the merits of plaintiff's arguments, we note that in exercising our jurisdiction with respect to what is essentially a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes. See 29 U.S.C. § 1132(a)(1)(B), (e)(1), § 1144(a).

The Plan and the Michigan courts must use ERISA definitions of terms and enforce decisions of federal courts interpreting ERISA statues.

(1) Statute 29 USC §1002 (22), defines a normal retirement benefit payable at normal retirement age as:

> The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age.

(2) Case law defines an accrued benefit as:

> "Accrued benefit" is benefit which ERISA plan participant earns annually as calculated according to formula specified by plan; it is benefit which fully vested employee would be entitled to receive at any particular point in time under term of plan if his or her employment ceased at that particular point in

time. *Beard v. Royal Electric, Inc.*, 795 F. Supp. 519 (D.R. I 1992).

(3) The court in *Korn v. Levine Bros. Iron Works Corp.* 574 F Supp. 836, 843 (S.D.N.Y. 1980) decided the Plan cannot provide a benefit less that the actuarial equivalent if an actuarial equivalent benefit has been promised when it stated:

> Defendants used a factor of 130.4 which represents an annuity factor. Plan section 1.31, however, states that "'Actuarial Equivalent' shall mean an amount of equivalent value, based upon a five per cent rate of interest and the 1971 Group Mortality Table." The latter figure, which is 130.834 in this case, cannot be replaced by another factor, such as the annuity factor, if its operation is to decrease benefits. See I.R.C. § 411(d)(6)(Supp.1983), 26 C.F.R. § 1.411(d)-3(b) and § 1.401-1(b)(1)(i)(1983); Rev.Rul. 81-12, 1982-2 I.R.S. 10. The trustees are not permitted to have the discretion to make substitutions that lessen benefits, in order to prevent the type of abuse that gave rise to the instant case. See also Rev.Rul. 79-90, 1979-11, I.R.B. 8.

The Plan admitted that Mr. Keane was eligible for an early retirement benefit on November 18, 1985 in its answer 4 to the complaint. In answer 22 the Plan admitted to the contents of Actuary John Rath's September 19, 1994 letter, which contains calculations of Mr. Keane's November 18, 1985 early retirement benefit, its reserve of $241,000.09 on November 18, 1985 and the reserve of $221, 651.71 which is the August 1, 1992 actuarial equivalent of 50% of Mr. Keane's November 18,

1985 reserve–the benefit Ms. Keane claims she was entitled to on August 1, 1992. App. 55a.

Under ERISA definition, Mr. Keane's November 18, 1985 accrued benefit is the early retirement annuity benefit calculated by actuary John Rath since this was the benefit he was entitled to receive if he had terminated participation in the Plan on November 18, 1985.

Statute 29 USC § 1002(22) is a critical part of ERISA'S integrated scheme to protect employees' vested and accrued benefits and is designed specifically to protect vested early retirement supplemental benefits from being eradicated when a plan references the normal or "payable-at-normal-retirement-age" benefit. Once a participant attains early retirement eligibility, on any given date, his or her early retirement benefit is his or her minimum payable-at-normal-retirement-age benefit which guarantees employees' earned vested and accrued benefits will not be reduced if and when calculating normal or payable-at-normal-retirement-age benefits. Post retirement eligibility, the early retirement benefit effectively becomes the normal retirement benefit and is a minimum benefit which cannot be reduced for any reason. *Cotter v E. Conf of Teamsters Retirement Plan*, 898 F. 2d 424, 428 (4th Cir. 1990).

On November 18, 1985, the value of Mr. Keane's normal retirement benefit payable at normal retirement age was an actuarial equivalent reduced (approximately 50%) benefit payable at normal retirement age. His early retirement benefit, which includes his supplemental benefit, was valued as his benefit payable at normal retirement age benefit reduced by an early retirement factor of 92.5%. Since the early retirement benefit is obviously greater than the normal retirement benefit, Mr.

Keane's benefit payable at normal retirement age on November 18, 1985, was the greater early retirement benefit as calculated in App. 54a under ERISA's definition of normal retirement benefit.

Applying ERISA guidelines to the first sentence of the QDRO, Mr. Keane's accrued benefit, normal retirement benefit, and early retirement benefit on November 18, 1985 were the exact same early retirement annuity calculated by actuary John Rath (App. 54a). This does not allow an interpretation which amends Ms. Keane's award of 50% of Mr. Keane's November 18, 1985 immediately payable accrued benefit to a deferred early retirement benefit, a frozen benefit or a deferred accrued benefit excluding the early retirement supplement since the second clause of the first sentence refers to the same annuity as does the first clause. The second clause of the first sentence specifies how to divide the accrued benefit.

Given the above and expert actuary John Rath's analysis of the QDRO, it certainly is not only possible, but very probable, that with discovery and expert testimony, Petitioner's interpretation will be the only valid interpretation under ERISA. App. 41a. Summary dismissal was precluded. This Court should grant certiorari so that the intent of Congress in passing REA into law will be achieved when state courts are properly monitoring calculation of benefits awarded in QDRO's and that calculations of employee accrued benefits for buy-outs or for transfer to another plan will be calculated under ERISA regulations.

I.

B. THIS COURT SHOULD GRANT CERTIORARI WHERE THE MICHIGAN COURT OF

APPEALS AFFIRMED SUMMARY DISMISSAL WHEN THE PLAN, DEFENDANT, MOVANT DID NOT PROVE THE ABSENCE OF ANY GENUINE ISSUES OF MATERIAL FACT, WHEN THERE IS NOTHING IN THE RECORD TO SUPPORT SUCH A CLAIM AND PETITIONER HAS SUPPORT FOR HER CLAIM?

(1) The Plan certainly could not and did not prove the absence of any genuine issues of material fact. There are many of them.

a. Is Mr. Keane's November 18, 1985, accrued benefit an annuity or is it the normal retirement, payable at normal retirement age benefit payment; and if it is not an annuity, is it a lump sum payment or can it be anything the plan or Michigan courts want it to be?
b. When was Ms. Keane entitled to commencement of benefits?
c. The value of Ms. Keane's benefit was $120,500.54 (App. 55a) on November 18, 1985, and $116,286.47 on August 1, 1992, as determined by the Plan (L.E.3 of Col. App. 34a). Was this a reduction in her accrued benefit and if so is the Plan's interpretation of the QDRO allowable under ERISA guidelines?
d. Since the "normal retirement benefit" is the only benefit payable at normal retirement age, is the benefit payable at normal retirement age the "normal retirement benefit"?
e. Do the words on page 2 of the QDRO:

> Being fifty (50%) percent of the benefit payments the participant would receive under the Plan if participant terminated

> participation in the Plan on November 18, 1985, and commenced benefit payments at participant's normal retirement age in the form of an annuity for the participant's life with payment ceasing at participant's death (the "assigned benefit").

define the "assigned benefit" as 50% of the reserves required to provide the benefit payments Mr. Keane would receive if he terminated participation in the Plan on November 11, 1985 or do they amend the award of 50% of Mr. Keane's accrued benefit to an award of 50% of Mr. Keane's accrued benefit excluding the accrued early retirement supplemental benefit, in violation of ERISA § 204?

(2) The plan has never claimed that there was anything in the record to support its claim for summary dismissal. It has only claimed that the plain words of the QDRO support its calculation even though the Plan's spokesman and counsel Mr. Borgeson stated in a letter on July 9, 1992, that the wording of the QDRO was confusing. App. 35a.

(3) The file is replete with support for Ms. Keane's claim.

a. *Stone v Stone*, 682 F. 2d 740, 743 (9th Cir. 1980), supports her claim to the same contractual rights to her share of the benefits that Mr. Keane has for his share.
b. *Cotter v E. Conf. Of Teamsters, supra,* where the court determined that benefits commence for retirement eligible employees at termination under the plan.

c. Expert John Rath opined that Ms. Keane should be compensated for the benefits she was entitled to receive but did not between November 18, 1985, and August 1, 1992. One of the methods he described to accomplish this is to provide her with the QDRO ordered actuarial equivalent of her November 18, 1985 entitlement.
d. The application of ERISA to the QDRO would provide her the benefit she claims.
e. The court in *Korn* says that the Plan may not provide her with less than the actuarial equivalent benefit as ordered; and
f. The Plan has never disputed actuary John Rath's critique of the Plan's determination of benefits.

This Court should grant certiorari because without enforcement of ERISA principles in the calculation of benefits awarded under a QDRO, REA will never fulfill the promise of Congress when it passed REA into law.

This petitioner is not trained in the art of legal research, but it sure seems to her that this case is a case of first impression both for the court's review of calculating an accrued benefit under an ERISA plan and also for this Court's review of the calculation of a QDRO benefit. The importance of accrued benefit calculations can't be overstated considering the national movement to cash-balance plans. And only this Court has the power and authority to discipline pension plans calculation of employee and their beneficiaries' benefits, particularly on a national basis.

II.

A. THE MICHIGAN COURT OF APPEALS VIOLATED MS. KEANE'S CONSTITUTIONAL RIGHTS

UNDER THE SUPREMACY CLAUSE OF SEC. VI OF THE U.S. CONSTITUTION WHEN IT AFFIRMED THE TRIAL COURT'S STATE-LAW-BASED SUMMARY DISMISSAL PRIOR TO THE PLAN'S COMPLIANCE WITH ERISA SEC. 503 OR COMPLETION OF DISCOVERY.

The conflict between ERISA § 503 and MCR 2.116 is loud and clear. That allows a claim against a plan for benefits denied to be dismissed before § 503 has been satisfied and the plaintiff has been fully informed as to the plan's position. *Weaver v Phoenix Home Life Mut. Ins. Co.*, 990 F.2d 154, 159 (4th Cir. 1993) states:

> where the plan administrator has failed to comply with ERISA's procedural guidelines and the plaintiff/participant has preserved his objection to the plan administrator's non-compliance, the proper course of action for the court is remand to the plan administrator for a 'full and fair review.'

Significantly, as stated in *Brown v American Intern. Life Assur. Co.* 778 F.Supp. 912, 917 (S.D. Miss. 1991), Congress broadly preempted state law when enacting ERISA, and the state law application must be consistent with the policy of ERISA.

In the present case, the intent of the parties was that Ms. Keane be awarded 50% of the November 18, 1985 accrued benefit including the early retirement supplemental benefit; to effect that intent, the QDRO orders the plan to pay her a benefit actuarially equivalent to 50% of the November 18, 19985 benefit. The intent of ERISA, as enunciated in *Brown, supra*, at 918, is:

> To insure that employees and beneficiaries are not deprived of eligible and anticipated benefits.

Clearly, Ms. Keane was deprived of benefits, and the spirit of ERISA was violated.

In *Richardson v Cent. States, Southeast & Southwest*, 645 F.2d 660, 665 (1981), the court found the Trustees were obligated to set out in opinion form the rationale supporting their decision so that the plaintiff could adequately prepare himself for any further reviews. As that court indicated, "the statute and regulations were intended to help claimants process their claims efficiently and fairly." *Id.* In the present case, the Plan committee has utterly failed to abide by these principles. Rather than advising Ms. Keane of her rights under the QDRO, the committee advised her to retain an attorney and seek recourse in court. Additionally, no explanation of its position was ever offered to Ms. Keane by the Plan; rather, she was told to take her arguments to court. It should also be stressed that the Plan has demonstrated wanton maliciousness toward Ms. Keane by holding her funds, forcing her to resort to food stamps and SSI to survive.

II.

B. THE MICHIGAN COURT OF APPEALS VIOLATED MS. KEANE'S CONSTITUTIONAL RIGHTS UNDER THE SUPREMACY CLAUSE OF SEC. VI OF THE U.S. CONSTITUTION WHEN IT DID NOT INTERPRET THE SECOND CLAUSE OF THE FIRST SENTENCE OF THE QDRO IN A MANNER TO ENFORCE THE INTENT OF EITHER THE PARTIES OR ERISA USING ERISA DEFINITIONS,

WITHOUT RENDERING THE FIRST CLAUSE MEANINGLESS.

The failure of the Michigan Court of Appeals to discipline its interpretation of the QDRO to ERISA definitions, which were designed to protect an accrued benefit from reduction by the Plan, led to a decision whereby Ms. Keane's "accrued benefit, already reduced by about 50% under the Plan's calculation, would be further reduced.

The Michigan Court of Appeals decision exacerbates the financial losses Ms. Keane suffered from the Trial Court's decision violating its own required May 24, 1991 stipulation and ERISA Sec. 204. The primary intent of ERISA is to protect earned accrued benefits, including supplemental early retirement benefits. The intent of the parties was to provide Ms. Keane with fifty percent of Mr. Keane's 11-18-85 accrued benefit including the accrued early retirement supplement.

State Courts' monitoring of Plan calculations of "accrued benefits" desperately needs the attention of this Court. A Writ of Certiorari should be granted.

III.

THE COURT OF APPEALS VIOLATED MS. KEANE'S CONSTITUTIONAL RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION WHEN IT ADJUDICATED THIS CASE WITHOUT MAKING THE FOLLOWING FINDINGS OF FACT WHICH ARE ABSOLUTELY ESSENTIAL TO DETERMINE THE BENEFITS SHE WAS ENTITLED TO RECEIVE AND WHETHER SHE RECEIVED THEM?

FACTS TO BE FOUND

A) What is Ms. Keane's "assigned benefit under the QDRO?

B) What are the differences, if any, between the "assigned benefit" and the benefit the Plan is required to pay Ms. Keane?

C) What and how many are the correct actuarial equivalent factors that need to be applied to the "assigned benefit" to convert it to a benefit of equal actuarial value to the form of the benefit the Plan is required to pay Ms. Keane?

D) Were each of the correct factors applied to the "assigned benefit" to determine the benefit payments for Ms. Keane?

E) Which of the benefits provided under the plan is the Plan paying Ms. Keane?

Without this information, it would be virtually impossible for an actuary to make an accurate determination of benefits. As such, a fair and equitable resolution of the issues in this matter was impossible. Because the trial court failed to make these findings, a number of different determinations were made at each level of legal proceedings, none of which, Ms. Keane stresses, are completely accurate.

IV.

THE QDRO MUST BE AMBIGUOUS GIVEN THAT:

A) THE TRIAL COURT INTERPRETED MS. KEANE'S BENEFIT AS A "FROZEN BENEFIT";

B) THE MICHIGAN COURT OF APPEALS INTERPRETED IT AS FIFTY PERCENT OF A DEFERRED VESTED ACCRUED BENEFIT, EXCLUDING THE EARLY RETIREMENT SUPPLEMENTAL BENEFIT;

C) THE PLAN CALCULATES IT TO BE A BENEFIT ACTUARIALLY EQUIVALENT TO MR. KEANE'S NOVEMBER 18, 1985 EARLY RETIREMENT BENEFIT WITH AN OPTION FOR DEFERRED INCOME DEFERRING CALCULATION AND COMMENCEMENT OF BENEFIT TO AUGUST 1, 1992; AND

D) THE PLAINTIFF PETITIONER INTERPRETS IT AS FIFTY PERCENT OF THE ACTUARIAL EQUIVALENT OF THE NOVEMBER 18, 1985 RESERVES REQUIRED TO PROVIDE THE ACCRUED BENEFIT.

E) THE PLAN'S COMPUTATION OF BENEFITS IS IN CONFLICT WITH MR. BORGESON'S LETTER OF JULY 9, 1991.

The variety of interpretations suggests a need for discipline. As stated above, Ms. Keane's claim for benefits from the date of termination is enforceable under ERISA pursuant to *Cotter, supra.*

With regard to the letter of July 9, 1991, Ms. Keane contends it is probative of an undesirable scheme on the part of Mr. Borgeson to benefit his company at her expense. Not only did Mr. Borgeson specifically state he

thought the QDRO was confusing, he failed to give any rationale for decisions of the committee. It would appear there is no committee, given that Ms. Keane has never heard from it or had a hearing, as is required. The relevant federal regulations that implement the statutory mandate provide a plan administrator shall provide to every claimant who is denied a claim for benefits, among other things, the specific reason or reasons for denial and the specific reference to pertinent plan provisions on which the denial is based. *Richardson v Cent. States, Southeast & Southwest*, 645 F.3d 660, 664 (1981), citing 29 C.F.R. Sec. 2560.503-1(f) (1980). One of the purposes of ERISA's requirement for "full and fair review" and its requirement for specific explanation for denial of claims is to protect plan participants from arbitrary or unprincipled decision making. *Weaver v Phoenix Home Life Mut. Ions. Co.*, 990 F.2d 154, 157 (4th Cir. 1993).

V.

THE QDRO TRANSFER THE SAME CONTRACTUAL RIGHT TO BENEFITS TO MS. KEANE THAT ERISA PROVIDES TO MR. KEANE?

Clearly, Ms. Keane has the same contractual rights under the QDRO as Mr. Keane pursuant to well-established case law. In *Stone v Stone*, 632 F.2d 740, 745, (1980), the court held the plaintiff had standing whether or not she was a "participant." The *Stone* Court ruled, "even if she is not a 'participant,' she is the former spouse of one and transferee of his rights." *Id.*

VI.

THE PLAINTIFF IS ENTITLED TO COSTS, PRE-JUDGMENT INTEREST, AND LEGAL FEES AS WELL

AS COMPENSATORY DAMAGES FOR LOSSES INCURRED FROM THE WITHHOLDING OF HER UNCONTESTED BENEFIT PAYMENTS, AND TO PUNITIVE DAMAGES FROM THE PLAN THAT PROMISED HER 50% OF MR. KEANE'S RETIREMENT ELIGIBLE NOVEMBER 11, 1985 ACCRUED BENEFIT WHEN IT QUALIFIED THE QDRO AND GAVE HER A DEFERRED EARLY RETIREMENT BENEFIT WHICH REDUCES HER AWARD BY ABOUT 50% AND ENRICHES THE PLAN.

The Plan has never disputed actuary John Rath's methodology for calculating Ms. Keane's entitlement to benefits accrued on November 18, 1985 (App. 41a) and has admitted in its complaint answer No. 22 to the contents of his report on benefit calculations (App. 53a) These two documents are the basis of support for Appellant's interpretation of the QDRO, which comports with the intent of the parties and the intent of ERISA and does not render any part of the QDRO meaningless. It is also well-supported by statute, case law, and plan provisions.

Case law supports Ms. Keane's claim. *Stone, supra* that she has a claim for benefits under ERISA. *Cotter, supra* that her claim for benefits from the date of her termination is enforceable under ERISA. *Korn, supra* that an ordered actuarial equivalent conversions must be performed because it is ordered. *Cotter, supra* finds that a beneficiary is entitled to benefits commencing at his retirement from the Plan and for Ms. Keane that date is December 1, 1985, the first date of the month following termination according to Plan provisions.

The independent actuarial evaluation of Ms. Keane's entitlement to benefits and calculation of reserves for

providing her a benefit supports her claim and is itself support by *Cotter, supra.* ERISA's definitions of accrued benefit and normal retirement benefit support her claim.

In *Eaton v. D'Amato,* 581 F.Supp. 743, 748(D.C. 1980), the court stated:

> In view of the limited discovery that has taken place regarding these matters, and the allegations of willfulness and malice which on this limited record are not devoid of factual support, summary judgment cannot issue at this time.

The Plan blatantly violated Ms. Keane's rights under ERISA. By dismissing Ms. Keane's Complaint before trial and even before discovery was complete, the Michigan courts not only violated Ms. Keane's right to due process, but also violated her rights under ERISA. It is this Court's duty to see to it that federal laws, such as ERISA, are enforced. Therefore, this Court should not only grant certiorari to review this blatant disregard of federal law by a Fortune 500 company, but should remand so that Ms. Keane can recover her compensatory damages for losses incurred from the withholding of her uncontested benefit payments. To do otherwise, would be to ignore our federal system of government.

CONCLUSION

The Plan and the Michigan Court of Appeals have blatantly disregarded the clear intent of Congress as it expressed itself in ERISA. ERISA was intended to increase the financial security of our work force. QDROs were designed by Congress under REA to extend that financial security to spouses as well as workers. Many spouses, ex-spouses and workers themselves depend on

the financial security to which they are entitled under ERISA. To make our system of federalism work, this Court can not countenance such blatant disregard of congressional intent by state courts. The forum of last resort for Plan participants and their beneficiaries is this Court. This Court should, therefore, grant certiorari and review the important federal questions raised by the Petitioner.

Respectfully submitted,

5-18-00
Date

Margaret M. Keane, Petitioner
In pro per

ORDER Michigan Supreme Court

Entered: December 21, 1999

MARGARET M. KEANE,

Plaintiff-Appellant,

v

IBM PENSION PLAN,

Defendant-Appellee.

SC: 114397
COA: 201912
95-002051-CZ

_____/

On order of the Court, the application for leave to appeal from the December 29, 1998 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Weaver, C.J., and Kelly, J., would remand the case to the trial court for further consideration because the record is inadequate to support the decision to grant summary disposition.

I, CORLIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 21, 1999 /s/ Corlin R. Davis
Date Clerk

Court of Appeals, State of Michigan

ORDER

Margaret M. Keane
v IBM Pension Plan

Docket No. 201912

LC No. 95-002051 CZ

Mark J. Cavanagh
Presiding Judge

William B. Murphy
Helen N. White
Judges

/

The Court orders that plaintiff's motion to file a reply to answer to motion is GRANTED.

The plaintiff's motion for rehearing is DENIED.

Judge White would grant rehearing.

A true copy entered and certified by Carl L. Groneck, Chief Clerk, on

March 16, 1999
Date

/s/ Carl L. Groneck
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

_____/

MARGARET M. KEANE, December 29, 1998

Plaintiff-Appellant,

v No. 201912
Kalamazoo Circuit Court

IBM PENSION PLAN, Case No. 95-002051 CZ

Defendant-Appellee.

_____/

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Plaintiff and her exhusband, Joseph P. Keane, were divorced on November 18, 1985. The original judgment of divorce awarded plaintiff a portion of Mr. Keane's pension at IBM. On May 28, 1991, plaintiff and Mr. Keane agreed to the entry of a qualified domestic relations order ("QDRO") that awarded plaintiff fifty percent of Mr. Keane's accrued benefit in the pension plan as of November 18, 1985. Mr. Keane subsequently retired in 1992 at age sixty-two. Plaintiff filed suit against defendant IBM Pension Plan, claiming, among other things, that defendant incorrectly calculated her benefits and that she is entitled to the increased value of her portion of the pension from 1985 to 1992. The trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8) and (10). Plaintiff appeals as of right. We affirm.

Plaintiff argues that defendant arbitrarily calculated her pension benefit in a manner inconsistent with the Employee Retirement Income Security Act of 1974, PL 93-406, 88 Stat 829, which appears generally as 29 USC 1001 *et seq.* (ERISA) and that the trial court erred in granting summary disposition to defendant on the issue. Specifically, plaintiff contends that she is entitled to an "actuarial increase" in her benefit payment to compensate her for the seven-year delay between the date of her divorce and the date the she requested her benefit payments to commence. We disagree.

On appeal, a trial court's grant or denial of summary disposition will be reviewed de novo. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by looking at the pleadings alone, *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), and may be granted where the opposing party "has failed to state a claim on which relief can be granted," MCR 2.116(C)(8). All factual allegations in support of the claim are accepted as true. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

A motion for summary disposition under MCR 2.116(C)(I 0) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). A motion may be granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. MCR

2.116(C)(10). The courts are liberal in finding a genuine issue of material fact. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278 (1992). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence available to it. *Patterson supra*, 434. The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). All inferences are to be drawn in favor of the nonmovant. *Dagen v Hastings Mutual Ins Co*, 166 Mich App 225, 229; 420 NW2d 111 (1987).

ERISA § 206, 29 USC 1056(d)(3)(A), requires a pension plan to "provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." The first paragraph of the QDRO in this case establishes the amount of plaintiff's benefit as fifty percent of Mr. Keane's "accrued benefit" as it would have been calculated if he terminated his employment with IBM on November 18, 1985:

> NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the IBM Retirement Plan (the "Plan") assign and pay as provided below to the Defendant, [Plaintiff] MARGARET M. KEANE (the "Alternate Payee"), Fifty (50%) Percent of the Plaintiff JOSEPH P. KEANE'S (the "Participant"), accrued benefit under the Plan as of November 18, 1985, being Fifty (50%) Percent of the benefit payments the Participant would receive under the Plan if Participant terminated participation in the Plan on November 18, 1985, and commenced benefit payments at Participant's Normal Retirement

> Age in the form of an annuity for the Participant's life with payment ceasing at Participant's death (the "Assigned Benefit").

However, the second paragraph of the QDRO sets forth a mechanism by which plaintiff is awarded the "actuarial equivalent" of plaintiff's assigned benefit in the event that the benefit commenced at a date other than Mr. Keane's normal retirement date:

> If the benefit required to be paid to the Alternate Payee [plaintiff] is required to be paid in a form other than the Assigned Benefit, that is other than commencing at Participant's [Mr. Keane's] Normal Retirement Date and payable for the Participant's life with Payments ceasing at the Participant's death, the benefit paid in such form shall be a benefit which is actuarially equivalent under the Plan's actuarial assumption to the Assigned Benefit. For purposes of calculating actuarial equivalency and making payments to the Alternate Payee, the measuring life for any alternate form of benefit shall be the Participant's life.

We agree with plaintiff that the second paragraph of the QDRO applies to plaintiff's award because plaintiff was paid benefits in a form other than the "assigned benefit," i.e., in a form other than commencing at Mr. Keane's normal retirement date. The normal retirement age under defendant's plan is sixty-five years. Because Mr. Keane commenced his benefits before his normal retirement age of sixty-five and because plaintiff requested that her benefit payments also commence at that time, plaintiff is entitled to a benefit payment that is

actuarially equivalent to her assigned benefit, as contemplated by paragraph two of the QDRO.

However, our interpretation of the QDRO leads us to conclude that the calculation employed to determine the actuarial equivalent of plaintiff's benefit has no impact on the delay between the date of divorce and the commencement of benefit payments. According to the plan, Joseph Keane's normal retirement age is sixty-five; thus, initially, it would appear that the amount of plaintiff's benefit payment would be determined by dividing her fifty percent interest in the pension as of November 18, 1985, into monthly payments commencing when Joseph Keane reaches the age of sixty-five and ending at his projected date of death. However, because Joseph Keane retired early, on August 1, 1992, when he was only sixty-two, and plaintiff elected to commence benefits at that time, the second paragraph of the QDRO, reproduced above, becomes applicable. In other words, because plaintiff's benefit payment is calculated in a manner "other than commencing at Participant's Normal Retirement Date," the benefit paid must be "actuarially equivalent" to the assigned benefit. In our view, this actuarially equivalency calculation, referenced in the QDRO, has no relevance to the delay between the divorce and the commencement of benefits. Rather, the calculation merely result in a smaller monthly benefit payment to compensate for the longer time period that the benefit would be paid. Accordingly, plaintiff's claim that paragraph two of the QDRO supports her argument that her benefit Payment should be increased is without merit.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition before discovery was completed. We disagree.

"Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). "However, summary disposition is not premature if the
discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition." *Id.* Because the trial court's decision in this case turned exclusively on its interpretation of the language of the QDRO, we conclude that further discovery would not have afforded plaintiff a fair chance of uncovering factual support for opposing defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET M. KEANE, Plaintiff-Appellant,

v

IBM PENSION PLAN, Defendant-Appellee.

December 29, 1998

No. 201912
Kalamazoo Circuit Court
LC No. 95-002051 CZ

Before: Cavanagh, P.J., and Murphy and White, J.J.

WHITE, J. (dissenting).

I respectfully dissent. The circuit court did not sufficiently address plaintiff's claims, and the record is inadequate to conclude that defendant is entitled to dismissal of plaintiffs claims as a matter of law. I would remand for further proceedings.

Acknowledging that the QDRO was inartfully drafted,[1] I conclude that it was sufficiently ambiguous regarding what plaintiff was awarded as an accrued benefit, and whether it contemplated that plaintiffs share, if to be determined by reference to a future benefit, would be divided and segregated for her benefit, rather than tied to a future benefit without regard to the time the benefit was actually received, to create genuine issues of material fact requiring further exploration. Further, plaintiff raised a genuine issue regarding the adequacy of defendant's response to her claim for increased benefits under the plan.

The QDRO first purports to award plaintiff 50% of her ex-husband's accrued benefit under the plan as of November 18, 1985. It then purports to define the accrued benefit under the plan as of that date as the benefit the participant would receive if he terminated participation in the plan on November 18, 1985 and commenced annuity benefit payments at normal retirement age.[2] However, the provision is ambiguous because it appears that the participant/ex-husband's accrued benefit under the plan as of November, 18, 1985 was not an annuity commencing at normal retirement age.[3] Rather, the participant was eligible for early retirement, and it further appears that the actuarial value of that accrued benefit was not the equivalent of the value of the benefit commencing at normal retirement age reduced by an early retirement factor, because the participant had sufficient years of service to be entitled to a calculation that reduced the benefit not from normal retirement age, but an earlier date reflecting 28 years of service at the time of the divorce.

The QDRO also provided that if the benefit was required to be paid in a form other than commencing at the participant's normal retirement date, the benefit paid would be a benefit that is actuarially equivalent under the plan's actuarial assumptions to the assigned benefit, (defined by reference to an annuity commencing at the participant's normal retirement date). Lastly, the QDRO provided that plaintiff could elect to commence benefits at any time on or after the date participant could elect to commence benefits under the plan (immediately).

Plaintiff complains, in essence, that she has been deprived of the increased value of her share of the retirement benefit that accrued simply by the passage of time, as distinguished from the increase in value attributable to the plan participant's continued

employment. Plaintiff's exhibits show that her benefit was frozen in time, while the participant's benefit increased substantially. Defendant has computed plaintiffs benefit in this fashion by relying on the language that ties the benefit to the amount the participant would receive assuming the commencement of benefits at normal retirement age. Plaintiff argues that the QDRO contemplated that that amount would be determined as of the date of the divorce, and then separated and segregated for her benefit. She would then be entitled to the actuarial equivalent of that benefit at any time she elected to commence receiving benefits. The actuarial equivalent would grow with the passage of time, based on plaintiff's survival and the fact that the commencement date was less far in the future. The record does not provide a great deal of insight into how defendant actually computed plaintiff's and the participant's benefits under the plan, other than that it appears that the participant's benefit at retirement was calculated, plaintiff's 50% as of 1985 was subtracted, and the participant was awarded the balance. It is unclear whether the substantial growth in the participant's benefit is due to his increased earnings, additional service, the passage of time, or a combination of the three. I believe plaintiff's claims are not properly dismissed without a clear answer to this question.

Although the circuit court correctly observed that the QDRO did not expressly provide for the accrual of interest on plaintiff's benefit[4] or that plaintiff would be awarded the actuarial equivalent of 50% of the accrued pension value at the time of divorce, plaintiff correctly points out that the QDRO as a whole can be read as contemplating that plaintiff's benefit would be fixed at the time of the divorce and available to her at her election, which would require some segregating and

current vesting of her share of the benefit, while defendant's approach seems to contemplate that plaintiff's right to receive half of the accrued benefit would not have measurable value to be segregated until actually drawn, but would be fixed in time and value as of November 1985 date.

The QDRO orders defendant to assign and pay 50% of the accrued benefit to plaintiff, albeit in a form that is tied to receipt at the participant's normal retirement age. The paragraph that provides that if the benefit is to be paid other than in the form of an annuity beginning at the participant's normal retirement age, it is to be actuarially equivalent to the assigned benefit, is silent regarding the time of valuation. Defendant has interpreted the various provisions as meaning that plaintiff's right is fixed as of November 1985, and the actuarial equivalent is fixed as of that time too in the sense that the right that is valued is the right in 1985 to receive a stream of payments the amount of which is fixed in 1985, and the entitlement to which will not commence until normal retirement age, assuming survival to that time. Plaintiff would read the provision as calling for the computation of the actuarial equivalent of the right as valued in 1985 as of the time actually drawn. Under plaintiff's interpretation, the actuarial equivalent in 1992, when the pension was drawn, would have been greater due to the passage of time.

Acknowledging that when all the information comes to light regarding the plan's provisions, its actuarial assumptions and usual methods of calculating benefits, the actuary's opinions, and the divorcing parties' intent,[5] defendant's position may prove to be correct, I would, nevertheless, reverse and remand for further proceedings to enable adequate discovery and development of the

record. Plaintiff should be required to join her ex-husband in the action because the outcome may affect his pension benefits.

/s/ Helene N. White

[1] The QDRO defined the accrued benefit by reference to a formula that did not account for the participant's accrued early retirement rights. Moreover, the formula did not make use of the fractional approach which would have awarded plaintiff 50% of a fraction of the participant's benefit, the numerator of which would be the years of service at the time of the divorce and the denominator of which would be the total years of service at retirement.

[2] There is no copy of the plan in the record. It appears that the normal retirement age is 65.

[3] In a trial court filing, plaintiff argued by analogy that if a will purported to leave a bequest of "one dollar, being two quarters," the bequest would be satisfied by one dollar bill or four quarters, notwithstanding the erroneous reference to two quarters.

[4] This would probably be inconsistent with the plan in any event because it is a defined benefit plan.

[5] While the QDRO is indeed an order, it was the product of stipulation, and an effort to implement the divorce judgment. Intent is therefore relevant.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

MARGARET KEANE,
Plaintiff

v Case No. D95-2051-CZ

IBM PENSION PLAN,
Defendant.
_____/

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

At session of said court held in the City and County of Kalamazoo, State of Michigan, on the 25th day of February, 1997

PRESENT: HONORABLE PHILIP D. SCHAEFER, Circuit Judge

This matter is before the court on Plaintiff's motion for reconsideration of this court's decision granting Defendant's motion for summary disposition.

STANDARD OF REVIEW

The procedure for a motion for reconsideration is outlined in MCR 2.119(F). The rule provides that:

> a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted.

> The moving party must demonstrate a palpable error by which the court and the parties have been misled . . .

MCR 2.119(F)(3). The decision to grant a motion for reconsideration is solely within the discretion of the trial court. *Fetz Engineering v Ecco Systems Inc,* 188 Mich App 362 (1991): *Cason v Auto Owners Insurance Co.* 181 Mich App 600 (1989).

BACKGROUND

Plaintiff, Margaret M. Keane, is an alternate payee for the pension benefits of Joseph P. Keane pursuant to a Qualified Domestic Relations Order (QDRO). Plaintiff and Mr. Keane were divorced on November 18, 1985, yet the QDRO was not entered until May 28, 1991.

Plaintiff filed suit in pro per, alleging that she was owed interest for the period from the date of divorce until the QDRO was entered. Defendant filed a motion for summary disposition, which the Court granted on May 6, 1996. It is this decision that Plaintiff requests reconsideration.

DISCUSSION

Plaintiff, now with the assistance of an attorney, makes several claims in her motion. Plaintiff alleges that Defendant misstated the law under ERISA during oral arguments for summary disposition. She maintains that ERISA permits interest to accrue for benefits for benefits under a QDRO. Plaintiff argues that she is entitled to interest which accrued on her share of the pension plan from November 18, 1985, until the date the QDRO was entered.

Defendant maintains that the law was not misstated but merely paraphrased. Moreover, Defendant argues that Plaintiff's claim is moot since the court did not rely on this point of law in rendering its decision..

Whether or not the law permits increases in an alternate payee's benefits under a QDRO, such as interest, is irrelevant to this case. This court determined that the QDRO in question does not provide for increases, like interest. In granting summary disposition, this court declared that:

> There is nothing in the terms of the QDRO that entities Plaintiff to 50% of the actuarial present value of her ex-husband's benefits, nor is there any provision in the QDRO which entitles Plaintiff to growth or interest. . . . Furthermore, there is no Michigan law which entitles Plaintiff to an award of interest . . . . [T]he court is aware of no other provision in ERISA or Federal law which would entitle Plaintiff to the claimed interest. Therefore, the Court finds that the complaint fails to state a claim for interest on her benefits under the QDRO.

(R. 16-17).

It is clear that this Court addressed the same issue Plaintiff raises in the motion for reconsideration. The motion for reconsideration should be denied. *Cason v Auto Owner's Insurance Co*, 181 Mich App 600, 605 (1989).

Plaintiff argues that the court committed palpable error because the order dismissing all of Plaintiff's claims with prejudice failed to comport with the court's oral decision at the May 6, 1996, hearing. Defendant

maintains that this argument is directly rebutted by the record.

This court declared, after granting the motion for summary disposition, that "there would be no basis, after reviewing this matter, for which an amended complaint should be allowed to be filed." (R. at 19). Thus, this court reasoned that, based on all the pleadings filed in this matter, any attempt by Plaintiff to amend her complaint would be futile.

Plaintiff urges this court to "give her a break" because she acted without counsel until the filing of this motion. Yet, this court acknowledged that Plaintiff acted without the assistance of counsel. Plaintiff received a break when sanctions were not imposed pursuant to MCR 2.114. At the hearing, this court declared:

> While Plaintiff's claims may appear frivolous to a trained attorney Plaintiff has proceeded without the aid of legal counsel. At this juncture, the Court will exercise discretion and not punish an individual for an attempt to assert rights without the aid of counsel.

(R. at 20).

Additionally, Plaintiff argues that the court committed palpable error in dismissing with prejudice Plaintiff's complaint prior to the completion of discovery. Defendant contends that a motion for summary disposition may be brought at any time pursuant to court rule. Moreover, Defendant argues that additional discovery would not add evidence to this case, all that is needed is the QDRO and relevant statutes.

A party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists. *Michigan Nat'l Bank v Metro Institutional Food Services, Inc,* 198 Mich App 236, 241 (1993). Summary disposition may be proper before discovery is complete "where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion." *Prysak v R L Polk Co, 193* Mich App 1, 11 (1992).

In this case, summary disposition was granted under both the MCR 2.116(C)(8) and (C)(10) standards. This court's decision was based on the fact that QDRO does not support Plaintiff's assertion and that further discovery would be futile. (R. 15). Plaintiff failed to present this court with any evidence establishing a factual dispute. This Court did not commit error in dismissing Plaintiff's complaint.

The remaining paragraphs of Plaintiff's motion allege that she should receive interest on the amount of pension benefits or an increase in her monthly benefit. Defendant's contend that this issue was addressed at the hearing.

As previously discussed, this Court decided the issue of interest for benefits due under the QDRO. The QDRO lacks a provision that entitles Plaintiff to growth or interest. Plaintiff is merely rehashing arguments addressed by this court at the May 6, 1996, hearing. A motion for reconsideration that merely presents that same issues as ruled on by the court will not be granted. *Cason v Auto Owners Insurance Co,* 181 Mich App at 605 (1989).

CONCLUSION

For these reasons, Plaintiff's motion for reconsideration should be DENIED.

IT IS SO ORDERED.

/s/ Philip D. Schaefer
PHILIP D. SCHAEFER, Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

MARGARET M. KEANE,
Plaintiff,

v File No. D 95-2051-CZ

IBM PENSION PLAN,
Defendant.
_____/

ORDER REQUIRING DEFENDANT TO RESPOND TO PLAINTIFF'S MOTION FOR RECONSIDERATION

At a session of said court held in the City and County of Kalamazoo; State of Michigan, on the 5th day of June, 1996.

Present: HONORABLE PHILIP D. SCHAEFER, Circuit Judge.

On June 4, 1996, Plaintiff filed a motion for reconsideration pursuant to MCR 2.119(F). In her motion, plaintiff is requesting the court to reconsider its decision which granted Defendant's motion for summary disposition and dismissed Plaintiff's claims with prejudice.

After reviewing Plaintiff's motion and supporting exhibits, the court finds the complexity of the issues to require a response from Defendant. Therefore, pursuant to the discretion permitted by MCR 2.119(F)(2), the court requires Defendant to file a response to Plaintiff's motion within 21 days. Furthermore, a hearing on this matter shall be held on September 16, 1996 at 4:00 pm.

IT IS SO ORDERED.

/s/ Philip D. Schaefer
PHILIP D. SCHAEFER,
Circuit Judge

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO

MARGARET M. KEANE,

Plaintiff,

vs. LC No. D 95-2051 CZ

IBM PENSION PLAN,

Defendant.
_____/

ORDER OF DISMISSAL
WITH PREJUDICE

At a session of said Court held this 21 day of May, 1996 at the Kalamazoo County Court-house in the City of Kalamazoo, County of Kalamazoo and State of Michigan.

PRESENT: HON. PHILIP D. SCHAEFER
Circuit Judge

The Court having reviewed the pleadings in the above entitled action and having heard oral argument on Defendant's Motion for Summary Disposition, it is hereby ordered that pursuant to MCR 2.116(c)8 and 2.116(c)10 that Plaintiff's Complaint be dismissed in its entirety with prejudice, for the reasons stated in open court at the hearing on Defendant's Motion for Summary

Disposition, which was conducted on May 6, 1996. Defendant's Motion for Sanctions is denied for the

reasons stated on the record by the Court. Each party is to bear its or her own respective costs and fees incurred in this action.

PHILIP D. SCHAEFER
Hon. Philip D. Schaefer
Circuit Judge

"Signed over objections
Which was filed late."

STATE OF MICHIGAN
9TH JUDICIAL CIRCUIT COURT
COUNTY OF KALAMAZOO

MARGARET M. KEANE,
Plaintiff,

v File No. D 95-2051 CZ

IBM PENSION PLAN,
Defendant.
_____/

PRETRIAL SUMMARY AND
SCHEDULING ORDER
(M.C.R. 2.401)

At a session of said Court held on the
12th day of December, 1995.

PRESENT: PHILIP D. SCHAEFER
Circuit Court Judge

A Pretrial Conference was held by questionnaire.

For Plaintiff(s): Margaret Keane, Pro Per
For Defendant(s): Kevin M. McCarthy

Pleadings: Satisfactory. Amendments by leave only.

Discovery Cut-off Date: May 31, 1996

Daily Transcript: Requests for daily transcript must be approved by the Judge not later than 7 days before trial.

Motions: All dispositive motions to be scheduled and heard 28 days before mediation. All other motions to be scheduled and heard 28 days before trial.

Briefs in Support of Motions: Legal authority shall accompany all motions. Briefs shall accompany all dispositive motions. Answering briefs shall be filed within 7 days before hearing. A copy of all motions and accompanying authority shall be simultaneously provided to the Judge's law clerk. MCR 2.119.

Mediation Date: August 9, 1996, Morning Session

Settlement Conference Date: October 1, 1996, 8:00 a.m., Court E

Trial Date: October 16, 1996, at 9:00 a.m.

The trial in this matter is estimated to take 2 days.

Jury Trial _____ Jury Fee Paid: yes___ No___

Non Jury Trial _x_ __X__ Trial fee of $15.00 will be paid to the Circuit Court Clerk prior to the taking of proofs.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF KALAMAZOO
******

JOSEPH P. KEANE,
Plaintiff,

vs.

MARGARET H. KEANE,
Defendant.
_____/

D 801-00-823DO

QUALIFIED DOMESTIC RELATIONS ORDER FOR DEFINED BENEFIT PLAN

At a session of said Court held in the City and County of Kalamazoo, State of Michigan, on the 28 day of May, 1991.

This cause having been brought on to be heard upon the petition filed by both of the parties, and the Court having heard the stipulation of the parties, and the Court being otherwise advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the IBM Retirement Plan (the "Plan") assign and pay as provided below to the Defendant, MARGARET M. KEANE (the "Alternate Payee"), Fifty (50%) Percent of the Plaintiff, JOSEPH P. KEANE'S (the "Participant"), accrued benefit under the Plan as of November 18, 1985, being Fifty (50%) Percent of the benefit payments the Participant would receive under the Plan if Participant terminated participation in the Plan on November is, 1985, and commenced benefit payments at Participant's Normal Retirement Age in the form of an annuity for the Participant's life with payment ceasing at Participant's death (the "Assigned Benefit").

If the benefit required to be paid to the Alternate Payee is required to be paid in a form other than the Assigned Benefit, that is other than commencing at Participant's Normal Retirement Date and payable for the Participant's life with payments ceasing at the Participant's death, the benefit paid in such form shall be a benefit which is actuarially equivalent under the Plan's actuarial assumption to the Assigned Benefit. For purposes of calculating actuarial equivalency and making payments to the Alternate Payee, the measuring life for any alternate form of benefit shall be the Participant's life.

Alternate Payee's benefits payment shall commence at any time elected by the Alternate Payee on or after the date Participant could elect to commence benefits under the Plan and the Assigned Benefit shall be paid subject to the provisions of the Plan regarding benefit election and charges for survivor benefits in any form elected by Alternate Payee which could have been elected by Participant (other than a survivor annuity designating Alternate Payee's spouse as beneficiary) were Participant commencing benefits under the Plan at a time Alternate Payee's benefits commence, including a 50% Qualified Joint and Survivor Annuity as defined in the Plan calculated as if Alternate Payee had remained married to the Participant.

If Participant dies before benefit payments commence to Alternate Payee, Alternate Payee shall be entitled to Pre-Retirement Spouse Protection ("PRSP") provided by the Plan and Participant shall sign any document necessary for that purpose. If Alternate Payee dies before benefit payments commence to Participant, Participant shall be entitled to Pre-Retirement Spouse Protection provided by the Plan and Alternate Payee shall sign any document necessary for that purpose.

Participant shall irrevocably elect a 50% Joint and survivor annuity designating the Alternate Payee as surviving beneficiary of his benefits under the Plan at the earliest date he is permitted to do so under the Plan provisions. Alternate Payee shall irrevocably elect a 50% Joint and Survivor annuity designating Participant as surviving beneficiary of her benefits under the Plan at the earliest date she is permitted to so under the Plan provisions.

Each of the parties shall provide to the other copies evidencing compliance with the provisions of this order and the Plan Administrator is directed to provide copies thereof to both the Participant and the Alternate Participant as may be requested from time to time.

At any time permitted by applicable federal law and the Plan, the Plan Administrator may require Alternate Payee to accept a lump sum payment in lieu of the Assigned Benefit due under the Plan. In no event shall the Plan be required to pay benefits on account of the Assigned Benefit which are greater than the benefit the Plan would have paid with respect to such portion of Participant's benefit had that portion not been assigned to the Alternate Payee.

/s/ PHILIP D. SCHAEFER
Circuit Judge

IBM Retirement Plan

Summary

This plan provides a regular monthly retirement income based on years of active employment. Monthly retirement income is based on service, a combination of service and earnings or a minimum benefit formula, whichever provides the greatest income. Plan highlights include:

- *Eligibility is based on continuous service, including approved leaves of absence.*
- *Employees may retire at age 55 with 15 years of service, at age 62 with five years of service and eligibility for early Social Security benefits, at age 65 with one year of service and at any age with 30 years of service.*
- *No reduction for retirement at age 60 and over.*
- *Pre-retirement spouse and post-retirement survivor protection available.*

Introduction

To assist you in retirement, the IBM Retirement Plan provides a regular monthly retirement income. However, the plan is not intended to be your only source of retirement income, since Social Security and personal savings should also be considered in your planning. This could include, for example, participation in company-sponsored savings plans.

All regular employees or regular part-time employees of IBM and its domestic subsidiaries who are covered by provisions of the United States Social Security

Act are covered by this plan beginning on their first day of employment, with full vesting after five years of service.

To permit flexibility in meeting your retirement needs, there are a number of retirement options available depending on your length of service and age. These options are described fully in the following sections.

Every month of service prior to your retirement date will be included in your retirement income computation; part of a month will be considered a full month. Your monthly retirement income payments begin on the first day of the month following your retirement. These payments are in addition to your ....

Early Retirement

There is no deduction to your retirement income if you retire at age 60 or older.

If you retire before age 60, a certain amount is deducted from your normal retirement income because you will receive retirement payments for a longer period of time.

Under the Service computation, for retirement at age 55 through 59, multiply your years of service up to your retirement date by a factor of $18.00 reduced by 10 cents for each year you are below age 60 at retirement. For retirement before age 55, there is also a 4 percent reduction for each year under age 55.

Under the Service and Earnings or Minimum Benefit computation, for retirement at age 55 through 59, retirement income is reduced by 2 percent for each year you are below age 60 at retirement. For retirement before age 55 there is also a 4 percent reduction for each year under age 55.

The following tables show how to determine the amount of monthly retirement income beginning at any of the ages indicated.

Regular Employee Income Formula

Employee's Age When Retirement Income Begins	Service (Years of Service Times the Following)	Service and Earnings and Minimum Benefit Formulas (Computed Retirement Income Times the Following)
60 or older	$18.00	100%
59	17.90	98
58	17.80	96
57	17.70	94
56	17.60	92
55	17.50	90
54	16.78	86
53	16.06	82
52	15.34	78
51	14.62	74
50	13.90	70
49	13.18	66
48	12.46	62
47	11.74	58

Note: There is a pro rata reduction for retirements between the ages shown.

IV. Deferred Income Option

If you plan to take this option, you should obtain an estimate of your age-65 Social Security benefits from the Social Security Administration. It will result in a more accurate calculation. *This is particularly important for those who have only worked in covered Social Security employment for a short time or have been out of the workplace for some time, since any estimate by the plan will assume employment for your entire working life regardless of the amount of time you actually worked for IBM.*

See the answer to the question, "When may I retire?" earlier in this chapter. In addition, there is an early retirement deferred retirement income opinion. You may defer the beginning of your retirement income up to age 65. Your retirement income will be based on years of service and earnings up to your early retirement date only.... If your retirement income payments begin prior to age 60, the amount will be reduced as described under "Early Retirement," except that the reduction factor is based on the date on which income is to begin rather than the date of early retirement.

Table B-1

IBM Retirement Plan

Determination of Benefits
Payable under Joseph P. Keane QDRO (S/W 350479)

Prepared 6/12/92

A. Employee's Assumed Retirement Date 07/31/92

B. AGES AT BENEFIT START DATE
1. Ms. Keane 58 Yrs, 06 Mos
2. Mr. Keane 62 Yrs, 11 Mos

C. 1. Benefit Service 34 Yrs, 09 Mos

[The core benefit is used to describe the monthly benefit payment commencing at normal retirement age (65) payable for Mr. Keane's life span.]

D. ALLOCATION OF CORE BENEFIT
1. Accrued Core Benefit as of 11/18/85 = $2,118.66
2. 7/31/92 Monthly Accrued Core Benefit: 3,874.99
Plan assigned 50% of D.1 to Ms. Keane = 1,059.33
Plan assigned remainder to Mr. Keane =$2,815.66
3.-8. Determines cost of 2nd wife to Mr. Keane=71.96
9. Net core benefit to Ms. Keane = #2 = $1,059.33
Net core benefit to Mr. Keane= #2 -#8 = $2,743.70

E. Converted Ms. Keane's benefit from Mr. Keane's life to her life:

1. Ms. Keane's 7/31/92 plan assigned benefit payment: = D(2) = 1059.33

2. 7-31-92 cost of $1 per year for Mr. Keane's life: = 9.8785
3. Plan reserve for its 7-31-92 benefit assigned to Ms. Keane = D(2) x 12 x E(2) = $116,286.47
4. 7-31-92 cost of $1 per year payable for Ms. Keane's life = 9.8785
5. Ms. Keane's life time benefit payment = E(3) ÷ E(4) = $11,771.67
6. Ms. Keane's monthly single life benefit = 5/12 = 980.97

F. 1-2. Converts an additional cash benefit (PRP) = $5,000 to a life annuity for Mr. Keane.

3. Monthly PRP annuity payable for Mr. Keane's life = $53.76

Table B-2

Calculation of J&S Benefit Payments

1. Straight life assigned benefit payment
   For Ms. Keane E(6) = 980.97
   For Mr. Keane D(9) + F(3) = 2,797.66
2. Actuarial equivalent J & S survivor factors
   For Ms. Keane = .9378
   For Mr. Keane = .9008
3. J&S benefit payments = (1) x (2)
   For Ms. Keane = ($980.97 x (.9378) = 919.85
   For Mr. Keane = ($2,797.66 x (.9008) = $2,519.95

International Business Machines Corporation

Office of the Senior Vice President
and General Counsel Armonk, New York 10504

July 9, 1991

W. Jack Keiser, Esq.
Miller, Johnson, Snell & Cummiskey
425 W. Michigan Avenue
Kalamazoo, MI 49007

Dear Mr. Keiser:

Your letter of June 6, 1991 was referred to me by the Program Administrator for a response. Let me state my interpretation of how the language in the order you enclosed is to be interpreted so that we have a mutual understanding. I have enclosed for your use an Informational Guide on QDROs and the IBM Retirement Plan. I am somewhat confused by the wording of the order such that I cannot qualify it at this time.

I read the order to require that when the participant begins to receive monthly benefits from the IBM Retirement Plan trust, then we will send the alternate payee a benefit based on 50% of the participant's accrued benefit as of November 18, 1985. However, we can only estimate a benefit accrued to a participant at any time before retirement since the Plan does not calculate actual benefits until an employee has retired. We do not make such calculations because benefits under the Plan are payable to a participant as a life annuity when an employee retires or reaches a requisite vested rights payment age (if the individual left IBM with vested rights). Since the Plan pays only in annuity form based on career service and earnings, IBM has no business need

to calculate a value of such annuity payments at a particular point in time.

If the alternate payee predeceases the participant before payments to her have commenced, then the full benefit reverts to him.

If the participant dies before retirement payments to the alternate payee have commenced, payments will be made to the alternate payee in Pre-Retirement Spouse Protection form ("PRSP"). The cost of this protection is being absorbed by the IBM Retirement Plan and participants are not charged for the cost. PRSP is available only in 50% form and is a "subsidized" pre-retirement spousal annuity under Section 417(a)(5) of the Internal Revenue Code. In such subsidized form, the benefit is available to a former spouse who survives the participant normally in an amount equal to one-half of the 50% above or 25%. We would also reduce the benefit entitlement by the actuarial cost of providing the survivor annuity. See Examples 3 and 4 in Congressman Clay's remarks in 130 *Cong. Rec.* H8762 (August 9, 1984).

The order requires that the alternate payee be paid by the dividing method. The amount payable to the alternate payee will be calculated in single life annuity form over the alternate payee's remaining lifetime, the so called "dividing method". The only way the Plan can comply with this is as follows: At the time payments are to begin, we will reduce the benefit entitlement to a present value using the Plan's then current actuarial assumptions. We will then spread the alternate payee's share of this amount in a monthly stream of payments over the life expectancy of the alternate payee, once again using the Plan assumptions. The alternate payee cannot convey a Plan interest by will or the laws of descent and

distribution. Although calculated in single life form, the benefit can be paid at the alternate payee's election in any form allowed by the Plan (except a joint and survivor form with a subsequent spouse of the alternate payee) but also subject to the proposed Treasury Regulation at Sec.1.401(a)(9)-1 which would, if made final, limit the naming of any survivor beneficiary by the alternate payee (other than the participant). (However, there will be an actuarial reduction in the alternate payee's benefit to pay the cost to the Plan of such survivor's coverage.)

Another consequence of the use of the dividing method, however, is that if the alternate payee dies after commencement of benefits, the alternate payee's share will not revert to the participant except to the degree that the alternate payee may have named the participant as a survivor beneficiary. The actuarial fees attendant to our calculations up to $200 will be payable by the alternate payee. If payments commence under the dividing method before the participant has retired, then the amount of the payment to the alternate payee may be adjusted at the time of the participant's actual retirement to reflect the life expectancy of the parties at that time. If either party predeceases the other, each party will be the survivor beneficiary of the other. Since the dividing method provides for lifetime benefits for the alternate payee, it strikes me as redundant to require survivor coverage also. Can you confirm that the intent of the order is to provide the alternate payee with both benefits payable over her lifetime along with survivor benefits on top of that if the participant predeceases her? This will essentially give her 100% of the participant's benefit if he predeceases her after retiring. In addition, can you confirm that the reverse situation was intended, namely that the alternate payee must provide at her expense a survivor benefit for the participant?

In the case of commencement of payments before the participant has retired, there will be a reduction (as prescribed by Sec. 414(p)(4)(A) of the Internal Revenue Code) in the benefit for each year of age the participant is under age 65 at commencement of payment to the alternate payee. The alternate payee will not in such case be entitled to share in any early retirement subsidy made available to the participant.

Our approval of an order as a Qualified Domestic Relations Order applies only to the portion of Plan benefits payable from the Trust Fund of the IBM Retirement Plan. Highly compensated employees can possibly receive benefit payments from Company operating funds and such payments are not governed by Section 414(p) of the Internal Revenue Code. Among the consequences are that no payments to the alternate payee can be made from these unfunded benefits until the participant actually commences receipt of benefits. I suggest you review Article 13 of the IBM Retirement Plan and Sections 401(A)(17) and 415 of the Internal Revenue Code in order to determine if there is other appropriate action to be taken.

We will report any payments to the alternate payee to the IRS (and state authorities, where appropriate) as required by Secs. 3405 and 402(a)(9) of the Internal Revenue Code.

Very truly yours,

/s/ R. D. Borgeson
Corporate Counsel

Jeffery S. Rubel

Kreis
Enderle
Callander
& Hudgins

July 13, 1992

CERTIFIED MAIL

Mr. R. D. Borgeson
IBM
Office of the Senior Vice
President and General Counsel
Old Orchard Road
Armonk, NY 10504

Re: QDRO - Joseph P. Keane

Dear Mr. Borgeson:

I am in receipt of IBM's proposed division of Joseph P. Keane's Pension Plan with IBM. I am writing to appraise you that I believe you are dividing the Plan in a manner inconsistent with the Qualified Domestic Relations Order which was served upon your office. The Qualified Domestic Relations Order clearly directs your office to:

> [A]ssign and pay as provided below, Margaret M. Keane, (the "Alternate Payee"), fifty (50%) percent of the Plaintiff, Joseph P. Keane's (the "Participant") accrued benefit under the Plan as of November 18, 1985 BEING FIFTY (50%) PERCENT OF THE BENEFIT.

You have divided the Plan in a manner which provides no growth to Mrs. Keane on the accrued benefit

through 1985. The Order clearly envisioned that Mrs. Keane would receive all growth on her portion of the Plan post 1985. If you believe my interpretation is incorrect, or you believe that Margaret Keane is receiving growth on her portion of the Plan, I would appreciate hearing from you immediately.

Very truly yours,

KREIS, ENDERLE,
CALLANDER & HUDGINS

/s/ Jeffery S. Rubel

RPS

April 6, 1993

Ms. Margaret Keane
3801 Willow Lake Dr.
Kalamazoo, MI 49008

Re: IBM Retirement Plan

Dear Ms. Keane:

At your request, we have reviewed the determination of the retirement benefit assigned to you as Alternate Payee under the Qualified Domestic Relations Order (QDRO).

Based on the information provided by IBM, you were entitled to receive a monthly benefit of $1,059.33 payable commencing on your former spouse Normal Retirement Date of September 1, 1989, if this benefit is payable prior to September 1, 1989, it must be reduced by 2.00% for each year that the actual date of payment precedes September 1, 1989. Hence, if your benefit had commenced on December 1, 1985, you would have received $979.88 per month payable for your former spouse's lifetime.

The actuarial present value of this benefit on December 1, 1985 was $128,116.86. In making the determination of the actuarial present value, we utilized the following actuarial assumptions:

Interest: 8.00% per annum, compounded annually
Mortality: Unisex Pension Mortality Table, set back 3 years

These are the same assumptions utilized by the Wyatt Company in their estimate prepared as of June 12, 1992.

The divorce decree states that the benefits payable under the Plan will be paid in the form of a Qualified Joint & 50% Survivor option with your former spouse named as the beneficiary. Under this form of payment, you would be entitled to receive a monthly benefit of $950.29 commencing on December 1, 1985.

In summary, you were entitled to receive a monthly retirement benefit of $950.29 payable under the Qualified Joint & 50% Survivor option commencing on December 1, 1985 determined as follows:

1. Monthly Benefit payable commencing on 09/01/89: $1,059.33

2. Early Retirement Benefit commencing on 12/01/85: $1,059.88 X 0.925 = $979.88

3. Actuarial Present Value of (2): $ 979.88 X 10.8952 X 12 = $128,111.86

4. Convert benefit to Qualified Joint & 50% Survivor option: $128,111.86 / (11.2344 X 12) = $ 950.29

Prior to converting the actuarial present value to a Qualified Joint & 50% Survivor benefit, the Wyatt Company converted the actuarial present value to a monthly benefit payable for your lifetime. This conversion to a lifetime benefit is not necessary since the conversion to the Qualified Joint & 50% Survivor option is based, in part, on your lifetime.

Since you have not received any monthly benefits under the Plan, your monthly benefit should be adjusted to compensate for the fact that your benefits will paid over a shorter expected period. There are a number of methods by which your benefit could be adjusted. Several options are outlined below:

1. ACTUARIAL INCREASE

   Typically, benefits are actuarially increased to account for this shortened expected payout period. An actuarial increase based on the aforementioned assumptions will result in a monthly benefit of $1,861.52 payable under the Qualified Joint & 50% Survivor option commencing on December 1, 1992.

2. CREDIT ACTUARIAL PRESENT VALUE WITH INTEREST

   In lieu of an actuarial increase, you should be compensated for the fact that IBM has had use of your retirement fund for the seven years from December 1, 1985 through December 1, 1992. For example, if the actuarial present value of your benefit as of December 1, 1985 ($128,116.86) were credited with interest at a rate of 9.50% per annum, compounded monthly, the value of your benefit as of December 1, 1992 would be $248,470.56. This amount when converted to the Qualified Joint & 50% Survivor option would pay you $2,003.42 per month.

3. ACCUMULATE PAST BENEFITS AND PAY OVER FUTURE LIFETIME

   The value of the past benefits not actually received could be determined as of December 1, 1992 and

paid in addition to the monthly benefit of $950.29. For example, the benefit of $950.29 payable from December 1, 1985 through November 1, 1992 are worth $106,369.29 as of December 1, 1992 accumulated at an interest at a rate of 9.50% per annum, compounded monthly. This amount when converted to the Qualified Joint & 50% survivor option would pay you $857.65 per month. Hence, you would receive $1,807.94 ($950.29 + $857.65) payable under the Qualified Joint & 50% Survivor option commencing on December 1, 1992.

We utilized a rate of return assumption of 9.50% per annum, compound monthly in our determination under options (2) and (3). This rate of return was easily attainable for the prudent investor during the period from December 1, 1985 through December 1, 1992.

It is likely that the IBM fund actually yielded rates of return that exceeded the 9.50% rate. Benefits not yet paid could be accumulated using the actual rates of return earned by IBM on the Retirement Plan assets.

In any case, you should be compensated for the benefits that you were entitled to receive but have not yet received.

We would welcome the opportunity to discuss this matter with you in further detail.

If you have any questions concerning this matter or should you require any additional information, please contact our office.

Sincerely,

/s/John R. Rath
Assistant Vice President and
Enrolled Actuary #93-4269

cc: Jeffery S. Rubel

Jeffery S. Rubel

Kreis
Enderle
Callander
& Hudgins

January 25, 1994

VIA OVERNIGHT DELIVERY

Mr. R. D. Borgeson
IBM
Office of the Senior Vice
President and General Counsel
Old Orchard Road
Armonk, NY 10504

Re: Joseph P. Keane

Dear Mr. Borgeson:

As you know, our office represents Ms. Margaret Keane. As you also know, on her behalf, we have disputed the accuracy of the monthly benefit payment payable to Margaret Keane under the International Business Machines ("IBM") pension.

Because it is my wish that you completely understand our position prior to making the actual division of the pension, I am writing one last time to explain our concerns.

In hopes of better explaining our position, I will refer throughout this letter to the "Determination of Benefits" prepared by the Wyatt Company. Accordingly, I have enclosed a copy for your benefit.

1. JOINT & SURVIVOR FACTORS

The Wyatt Company divided the benefits that were earned by Mr. Keane as of November 18, 1985, $2,118.66. Mrs. Keane's portion of this benefit was determined to be $1,059.33 payable commencing on August 1, 1992. In order to determine the amount of the Joint & 50% Survivor benefit, the Wyatt Company first determined the value of this benefit based on Mr. Keane's life, $116,286.47. This amount is contained in the Alternate Payee column at item E3. of Table B-1.

The second step was to convert the present value to a single life pension based on Margaret's lifetime. This Single Life benefit is $980.97 and is contained in item E6. of Table B-1.

The final step is converting the Single Life benefit to a Joint & 50% Survivor benefit with Margaret as the primary annuitant and Mr. Keane as the contingent annuitant. We believe that an error has occurred in this conversion.

The factor used to convert a benefit from a Single Life annuity to a Joint & 50% Survivor annuity is dependent upon the ages of the primary annuitant and the contingent annuitant. Since Mr. Keane is older than Margaret, it is probable that he will predecease Margaret, in which case, she would be entitled to his contingent benefit amount.

As it is more likely that Margaret will receive Mr. Keane's contingent benefit than the other way around, his conversion factor from a Single Life annuity to a Joint & 50% Survivor annuity should be a lower factor (a greater

reduction) than Margaret's factor in order to provide for a more likely payment of contingent benefits.

You will note that the Joint & Survivor factors contained in Item A2. of Table B-2 reduce Margaret's benefit by a greater percentage than Mr. Keane's benefit. This is incorrect.

The notes at the bottom of Table B-1 indicate that the annuity factors utilized in this Table used the UP-84 Mortality Table, with a 3-year setback and 8.0% interest. Using the same assumptions, the results should indicate that Margaret's conversion factor should be 0.9457, and that Mr. Keane's conversion factor should be 0.9106. Hence, Margaret's Joint & 50% Survivor benefit should be $927.70 per month ($980.97 x 0.9457) rather than $883.66 as shown in Table B-2. Margaret's conversion factor would result in less of a reduction than Mr. Keane's conversion factor under any interest and mortality assumptions.

11. BENEFIT FROM DECEMBER 1, 1985

You will note that the Qualified Domestic Relations Order ("QDRO") does not in any way specify or limit the payments either prospectively or retrospectively. The benefit payment is retroactive to November 18, 1985 and hence the commencement of benefit is elected by the alternate payee to be retroactive to December 1, 1985. The division of the pension plan payment must coincide with commencement of benefits or you violate the pension plan agreement between IBM and its employees.[1] Finally, this election is made in advance of the eighteen (18) month period set forth in IRC 414(p) and accordingly is entitled to retroactive application.

[1] In this regard, see also IRC 414(p).

As noted above, the Determination of Benefits form indicates that Ms. Keane would have been entitled to receive a monthly benefit of $1,059.33 payable commencing on Joseph Keane's normal retirement date of September 1, 1989. If this benefit is payable prior to September 1, 1989, it must be reduced by 2.00% for each year that the actual date of payment precedes September 1, 1989.[2] Hence, if her benefit had commenced on December 1, 1985, she would have received $979.88 per month payable for Joseph Keane's lifetime.

[2] In this regard, see IBM plan documents.

The actuarial present value of this benefit on December 1, 1985 was $128,116.86. In making the determination of the actuarial present value, the following assumptions have been used:

Interest: 8.00% per annum compounded annually

Mortality: Unisex Pension Mortality Tables, set back 3 years

These are the same assumptions utilized by Wyatt Company in the estimate prepared as of June 12, 1992.

The QDRO states that the benefit payable under the plan will be paid in the form of a Qualified Joint & 50% Survivor option with Joseph Keane named as the beneficiary. Hence, Ms. Keane would be entitled to receive a monthly benefit of $950.29 commencing on

December 1, 1985. This payment was determined as follows:

1.	Monthly benefit payable on 9/1/89:	$ 1,059.33
2.	Early retirement benefit on 12/1/85:	$ 979.88
3.	Actuarial present value of #2 $979.88 x 10.8952 x 12 =	$ 128,111.86
4.	Convert benefit to Qualified Joint & 50% Survivor Option: $128,111.86 / (11.2344 x 12) =	$ 950.29

Since Ms. Keane has not received any monthly benefit under the plan, her monthly benefit must be adjusted to compensate for the fact that her benefit will now be paid over a shorter expected period.

We would suggest the following methods as potential options under which IBM could adjust her benefit:

1. Actuarial Increase

   We believe that benefits can (and often are) actuarially increased to account to the shortened expected payout period. An actuarial increase based on the aforementioned assumption will result in a monthly benefit of $1,861.52 payable under the Qualified Joint & 50% Survivor option commencing on December 1, 1992.

2. Credit Actuarial Present Value with Interest

   In lieu of an actuarial increase, Ms. Keane could be compensated for the fact that IBM has had use of her retirement fund for seven (7) years from December 1, 1985 through December 1, 1992. For example, if

the actuarial present value of Ms. Keane's benefit as of December 1, 1985 ($128,116.86) were credited with interest at a rate of 9.50% per annum, compounded monthly, the value of her benefit as of December 1, 1992, would be $248,470.56. This amount when converted to the Qualified Joint & 50% Survivor option would pay her $2,003.42 per month.

3. Accumulate Past Benefit and Pay Over Future Lifetime

The value of the past benefit not actually received could be determined as of December 1, 1992 and paid in addition to the monthly benefit of $950.29. For example, the benefit of $950.29 payable from December 1, 1985 through November 1, 1992 are worth $106,369.29 as of December 1, 1992 accumulated at an interest rate of 9.50% per annum, compounded monthly. This amount when converted to the Qualified Joint & 50% Survivor option would pay Ms. Keane $857.65 per month. Hence, she would receive $1,807.94 ($950.29 + 857.65) payable under the Qualified Joint & 50% Survivor option commencing on December 1, 1992.

I have utilized a rate of return assumption of 9.50% per annum, compounded monthly in the determination under option (2) and (3). It would seem that given the returns received in the late 80's, this would be easily attainable during the period of 1985 through 1992. I would assume that the IBM fund actually yielded rates of return that exceeded the 9.50% rate.

In any event, Ms. Keane should be compensated for the benefit that she was entitled to receive but did not receive because the QDRO was not in place until May 28,

1991.[3] In hopes of resolving this without the necessity of further conflict, Ms. Keane would accept any one of the options outlined above. You should, however, understand that we will not allow the benefits which were ordered paid to Ms. Keane by the QDRO of May 28, 1991 to default to IBM.

It is my hope that this letter will explain our position and remove all confusion with regard to Ms. Keane's requested division of the monthly benefit.

I am sure that you understand IBM's fiduciary obligation to Ms. Keane. It is my sincere hope that we can resolve this matter. Will you please advise me of IBM's position?

Very truly yours,

KREIS, ENDERLE,
CALLANDER & HUDGINS

/s/Jeffery S. Rubel

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[3]Actually this Order was subject to Appellate review until October 20, 1993.

September 19, 1994 Retirement Plan Concepts, Inc.

Ms. Margaret Keane
3801 Willowlake Drive
Kalamazoo, MI 49008

RE: IBM Retirement Plan

Dear Ms. Keane:

At your request, we have determined the monthly early retirement benefit payable to Mr. Joseph Keane assuming he retired from IBM effective on November 18, 1985.

Mr. Keane's early retirement benefit is contained on the enclosed Schedule A.

In addition, you requested that we determine the actuarial present value of Mr. Keane's early retirement benefit payable on December 1, 1985. This value and the Alternate Payee's value are contained on the enclosed Schedule B.

Further, you have requested that we determine the actuarial present value as of August 1, 1992 of the Alternate Payee's benefit payable on December 1, 1985. This value is contained on the enclosed Schedule C.

We would welcome the opportunity to discuss the Schedules with you. Should you have any questions concerning, this matter, please contact our office.

/s/John R. Rath
President, Enrolled Actuary #93-4269

SCHEDULE A

CALCULATION OF JOSEPH KEANE'S EARLY RETIREMENT BENEFIT COMMENCING ON DECEMBER 1, 1985

A. Monthly benefit payment earned as of November 18, 1985 and commencing at age 60 ..... $2,118.66

B. Early retirement reduction for 3.75 years at 2.00% per year (.02 x 3).75 x $2,118.66) $158.90

C. Monthly benefit payment earned as of November 18, 1985 and commencing on December 1, 1985 (A) - (B) $1,959.76

SCHEDULE B

CALCULATION OF THE ACTUARIAL PRESENT VALUE OF JOSEPH KEANE'S EARLY RETIREMENT INCOME EARNED AS OF NOVEMBER 18,1985

A. Monthly early retirement benefit earned as of November 18, 1985 and commencing on December 1, 1985 (Schedule A) $1,959.76

B. Annual early retirement benefit payment (A) x 12 ..... $23,517.12

C. Actuarial present value factor for each $1 of annual benefit commencing at age 56 ..... 10.2479*

D. Actuarial present value of Joseph Keane's pension payable from the IBM Retirement Plan on December 1, 1985 ..... $241,001.09

E. Value of Alternate Payee's benefit as of December 1, 1985 (D) x 1/2 ..... $120,500.54

* Determined using the Unisex Pension 1984 Mortality Table setback three years

SCHEDULE C

DETERMINATION OF THE VALUE ON AUGUST 1, 1992 OF ALTERNATE PAYEE'S BENEFIT ACCRUED AS OF NOVEMBER 18,1985

A. Actuarial present value of Alternate Payee's benefit as of December 1, 1985 (Schedule B) . $120,500.54

B. Factor for actuarial increase due to interest and survivorship 1.839425*

C. Actuarial present value on August 1, 1992 of Alternate Payee's benefit accrued as of November 18, 1985 and payable on December 1, 1985
(A) x (B) $221,651.71

* Determined using the Unisex Pension 1984 Mortality Table setback three years and based on the age of the Participant

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

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On July 9, 1991 IBM's corporate counsel, Mr. Borgeson, who is also counsel for Wyatt Co., the Pension Plan's actuary, sent a letter to Jack Keiser responding to the QDRO, ...attached as Exhibit D. Borgeson admitted that he is "somewhat confused by the wording of the "QDRO" and goes on to say (passages from letter in quotes appellant's comments in parenthesis):

1. [W]e will send the Alternate Payee (Appellant) a benefit based on 50% of the Participant's accrued benefit as of November 18, 1985." (The amount of the Participant's unreduced accrued normal retirement benefit payment, based on career service and earnings accrued as of November 18, 1985, was a well-established, fixed amount of $2,118.66/month on the date this letter was sent. If the interpretation of the QDRO was that Mrs. Keane's benefit was 50% of the unreduced payable November 11, 1985 benefit commencing at Mr. Keane's retirement, the letter could and should have specifically stated that the Alternate Payee's benefit would be payment of $1,059.33 per month commencing when Participant retired. What the letter said was that Mrs. Keane's benefit would be based on 50% of participant's accrued benefit as of November, 1985 which could only be the early retirement benefit which was 92.5% of the normal retirement benefit commencing December 1, 1985.)

2. "However we can only estimate a benefit accrued to a participant at any time before retirement since the Plan does not calculate actual benefits until an

employee has retired." (This allows for growth in a benefit due to a plan improvements or actuarial equivalency increases up to actual commencement of benefits.)

3. "[B]enefits under the Plan are payable to a participant as a life annuity when an employee retires or reaches a requisite vested rights payment age." (Any division of benefits is a division of an annuity and not a division of an annuity payment.)

In the middle paragraph of the second page, Mr. Borgeson defines the order as requiring the alternate payee to be paid by the dividing method.

4. "The only way the Plan can comply with this is as follows: At the time payments are to begin, we will reduce the benefit entitlement to a present value using the Plan's then current actuarial assumptions. We will then spread the alternate payee's share of this amount in a monthly stream of payments over the life expectancy of the alternate payee, once again using the assumptions." (The second sentence makes it clear that what is being divided is the value of the benefit entitlement or investment reserve required to produce the benefit payments the participant is entitled to receive and that the alternate payee share of this amount will be converted to an annuity payable for her life. This comports with paragraph 3 of the QDRO and allows the alternate payee to commence benefits on or after December 1, 1985 even if participant continues working with IBM. It also follows the legal precedence of awarding a lump sum payment to satisfy an award of a sum certain paid at specific intervals over a specified period of time.)